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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/776,020	02/09/2004	Ramez Emile Necola Shehada	064693-0102	9080

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MCDERMOTT, WILL & EMERY  
Suite 3400  
2049 Century Park East  
Los Angeles, CA 90067

EXAMINER

GIBSON, KESHIA L

ART UNIT PAPER NUMBER

3761

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Please find below and/or attached an Office communication concerning this application or proceeding.



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APPLICATION NO/ CONTROL NO.	FILING DATE	FIRST NAMED INVENTOR / PATENT IN REEXAMINATION	ATTORNEY DOCKET NO. <span style="float: right;">E</span>
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10/776, 020

EXAMINER
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ART UNIT	PAPER
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20050801

DATE MAILED:

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Commissioner for Patents

<b>Office Action Summary</b>	<b>Application No.</b> 10/776,020	<b>Applicant(s)</b> SHEHADA, RAMEZ EMILE NECOLA	
	<b>Examiner</b> Keshia Gibson	<b>Art Unit</b> 3761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-23 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-23 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>1/4, 4/1&amp;6/15/05</u> . | 6) <input type="checkbox"/> Other: ____.  |

## **DETAILED ACTION**

### ***Election/Restrictions***

1. Applicant is advised that the current application contains distinct inventions.

However, for purposes of this Office Action, the Examiner has not required a restriction/election be made. However, if appropriate, the Examiner may require a restriction requirement at any point during the prosecution of the current application.

### ***Specification***

2. Applicant is reminded of the proper language and format for an abstract of the disclosure.

The abstract should be in narrative form and generally limited to a single paragraph on a separate sheet within the range of 50 to 150 words. It is important that the abstract not exceed 150 words in length since the space provided for the abstract on the computer tape used by the printer is limited. The form and legal phraseology often used in patent claims, such as "means" and "said," should be avoided. The abstract should describe the disclosure sufficiently to assist readers in deciding whether there is a need for consulting the full patent text for details.

The language should be clear and concise and should not repeat information given in the title. It should avoid using phrases which can be implied, such as, "The disclosure concerns," "The disclosure defined by this invention," "The disclosure describes," etc.

3. The abstract of the disclosure is objected to because "The present invention is directed to". It is suggested that this language be deleted; no substitute language is required. It is also suggested the last sentence (lines 3-6) be reworded such that the language "The invention" is not necessary. For example, "Modifications may be made to the surgical drain to improve stabilization..." Correction is required. See MPEP § 608.01(b).

***Definitions/Interpretations***

4. The following definitions and interpretations have been used for purposes of this

Office Action:

- a. conduit- passage (pipe or tunnel) through which a liquid or electric wires can pass
- b. lumen- a cavity or passage in a tubular organ
- c. energy- the capacity of a physical system to do work
- d. sense- perceive by a physical sensation, e.g., coming from the skin or muscles
- e. transmit- transfer to another; serve as the medium for transmission

***Claim Rejections - 35 USC § 112***

5. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

6. Claim 15 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

7. Claim 1 recites the limitation "the drain lumen" in line 5. There is insufficient antecedent basis for this limitation in the claim. There is no prior reference within the claim to a "drain lumen." It is unclear as to whether "drain lumen" is to be considered the

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same structure as the previously stated "elongated conduit" or if applicant is referencing a completely different structure.

8. Claim 15 recites the limitation "the third sensing system" in lines 2 and 3. There is insufficient antecedent basis for this limitation in the claim. It is unclear as to whether the first recitation of the limitation should 1) read "a third sensing system" and depend from Claim 10, 2) read "the third sensing system" and depend from Claim 12, or 3) read "the second sensing system" and depend from Claim 10. Applicant should insure that that the second recitation be congruent with the first. For purposes of examination, the claim as been considered to intend that the drain of Claim 10 further comprises a third sensing system (listed as possible option 1 above).

### ***Claim Rejections - 35 USC § 102***

9. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

10. Claims 1-4, 6-7, 9-11, 13, and 16-21 are rejected under 35 U.S.C. 102(b) as being anticipated by Johnson (US 3,866,599).

In regard to Claim 1, Johnson discloses a surgical drain 1 comprising an elongated conduit 2 configured to be implanted in and to drain from a body cavity (column 1, lines 7-10). The drain 1 further comprises a first sensing system 11, 21, 27; the fibers are

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configured to transmit and receive energy from body tissue (column 1, lines 20-25 and lines 44-49; column 2, lines 12-22 and lines 51-66). Johnson discloses multiple sensing (and transmitting) systems, any of which may be considered a first sensing system.

In regard to Claim 2, the drain 1 is designed to drain body fluids, and is therefore considered capable of draining blood, puss, bile, or intestinal contents.

In regard to Claims 3-4, Johnson discloses that the drain comprises a sensing system that can sense physiological properties, including oxygenation and pressure (column 1, lines 44-49; column 2, lines 16-22 and 33-36).

In regard to Claim 6, Johnson discloses that the drain further comprises an oximeter that receives energy from the optical fibers 11, 21, 27 (column 2, line 62-column 3, line 5). The oximeter provides measurements, so it would have to display these measurements in some form to the user. Thus, the oximeter is considered analogous to a display.

In regard to Claim 7, Johnson discloses a surgical drain 1 comprising an elongated conduit 2 having a lumen (cavity or passage) configured to be implanted in and to drain from a body cavity (column 1, lines 7-10). The drain 1 further comprises a first sensing system 11, 21, 27 and a first transmitting system 11, 21, 27; the fibers are configured to transmit and receive energy from body tissue (column 1, lines 20-25 and lines 44-49; column 2, lines 12-22 and lines 51-66). Any portions of the lumen proximate (near) the first sensing system 11, 21, 27 and the first transmitting system 11, 21, 27 can be defined as a "first position" or a "second position." Johnson discloses multiple

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sensing/transmitting systems, any of which may be considered a first sensing system and a first transmitting system.

In regard to Claim 9, the sensing/transmitting systems 11, 21, 27, and thus their associated first and second positions, are arranged in a circle first and second positions can be defined so as to be located on substantially opposite sides of the drain lumen.

In regard to Claim 10, as discussed for claims 1 and 7, Johnson discloses multiple sensing/transmitting systems, any of which (not defined as a first sensing system or a first transmitting system) may be considered a second sensing system or a second transmitting system. Any portions of the lumen proximate (near) the second sensing system 11, 21, 27 and the second transmitting system 11, 21, 27 can be defined as a "third position" or a "fourth position."

In regard to Claim 11, a processing system in communication with the sensing systems and is used to compare (or is capable of comparing) a difference between the energy detected by the systems (column 2, line 62-column 3, line 5).

In regard to Claim 13, as discussed for Claim 4, the drain comprises a sensing system that can sense physiological properties, including oxygenation and pressure (column 1, lines 44-49; column 2, lines 16-22 and 33-36).

In regard to Claim 16, as discussed previously, Johnson discloses a surgical drain 1 having a lumen 12, 22, etc. and a first sensing system 11, 21, 27. Johnson further discloses a process in which the drain is to be placed into the body in proximity to body



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tissue and receives information from the first sensing system 11, 21, 27; the information received is monitored to evaluate the condition of the tissue (column 2, lines 12-28).

In regard to Claim 17, energy (light, etc.) is transmitted within the lumen 12, 22 and receiving by the first sensing system 11, 21, 27 (column 2, lines 12-28).

In regard to Claim 18, the process further includes processing the received information, such as with an oximeter (column 2, lines 12-28; column 2, line 51-3, line 5).

In regard to Claim 19, see discussion for Claim 5.

In regard to Claim 20, the drain is anchored to the tissue through use of an expandable sleeve (column 3, line 36-column 4, line 13).

In regard to Claim 21, the difference between Claim 21 and Claim 16 is that the drain comprising second sensing system in addition to the first sensing system. As discussed for Claims 3-4, the drain further comprises a second sensing system.

11. Claims 1-7, 9, 16-19, and 21-23 are rejected under 35 U.S.C. 102(b) as being anticipated by Takezawa et al. (US 5,108,364).

In regard to Claim 1, Takezawa et al. disclose a surgical drain 1 comprising an elongated conduit 2 and a first sensing system 10 (Figs. 1A-5; column 2, lines 49-68; column 3, lines 26-44; column 4, lines 1-15; column 5, line 38-column 6, line 14).

In regard to Claim 2, the drain 1 is designed to drain body fluids, and is therefore considered capable of draining blood, puss, bile, or intestinal contents.

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In regard to Claim 3, the drain 1 further comprises a second sensing system 14, which measures the pressure within the body cavity- a physiological property different from that of the first sensing system (Figs. 1A-5; column 4, lines 33-50).

In regard to Claim 4, the physiological property sensed is temperature (column 3, lines 26-43; column 4, lines 1-26).

In regard to Claim 5, the drain has a drain portion having a plurality of holes 5 spaced along its length (Figs. 1A-5; column 3, lines 26-43).

In regard to Claim 6, the drain 1 further comprises a display (monitor) in communication with the first sensing system 10 and configured to depict data (column 4, lines 3-15 and lines 44-50).

In regard to Claim 7, Takezawa et al. disclose a surgical drain 1 comprising an elongated conduit 2 having a lumen (cavity), a first sensing system 10, and a first transmitting system 21 (Figs. 1A-5; column 2, lines 49-68; column 3, lines 13-44; column 4, lines 1-15; column 4, line 51-column 6, line 20). (The third auxiliary tube 21 can transfer pressures in different regions of the body cavity or be used to supply liquid drugs and is therefore considered to be analogous to a transmitting system.) Any portions of the lumen proximate (near) the first sensing system 10 and the first transmitting system 21 can be defined as a "first position" or a "second position."

In regard to Claim 9, the first sensing system 10 and the first transmitting system 21 are located on opposite sides of the drain lumen; therefore, the first and second positions are also located on opposite sides of the drain lumen.

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In regard to Claim 16, Takezawa et al. disclose a method comprising implanting a surgical drain having a lumen and a first sensing system into a body cavity, receiving information from the first sensing system and monitoring the information received from the first sensing system (column 1, line 50- column 2, line 28; column 4, line 1-column 5, line 5; column 5, line 38-column 6, line 14).

In regard to Claim 17, see discussion for Claim 7.

In regard to Claims 18-19, see discussion for Claim 6.

In regard to Claim 21, the difference between Claim 21 and Claim 16 is that the drain comprising second sensing system in addition to the first sensing system. As discussed for Claims 3-4, the drain further comprises a second sensing system.

In regard to Claims 22-23, the method comprises processing information from the first and second sensing systems to compare a difference in information received from the sensing systems- proximate to different positions along the drain lumen (column 4, line 61-column 5, line 5; column 5, lines 34-37; column 21, lines 21-26).

### ***Claim Rejections - 35 USC § 103***

12. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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13. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

14. Claims 5 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Johnson in view of Russo et al. (US 4,317,452).

In regard to Claims 5 and 14, Johnson discloses a surgical drain 1 having a conduit configured to rest against a substantial length of tissue within the body cavity and having a lumen 22 (considered analogous to a drain hole) (Figs. 1-6; column 2, line 29-column 3, line 5). Johnson discloses that claimed invention except for the conduit comprising a plurality of holes spaced along substantially the entire length of the drain portion. Russo et al. discloses a surgical drain comprising a conduit 10 having a plurality of holes along substantially the entire length of the drain portion (Fig. 1; column 2, lines 7-19; column 4, line 56-column 5, line). Russo et al. teach that having holes along a substantial portion of the conduit 10 allows body fluids in the cavity to pass into and along the conduit into a drainage site. Johnson and Russo et al. are analogous art because they are within the same field of endeavor: surgical catheters/drains. One of ordinary skill in the art would have been motivated to modify the surgical drain of Johnson by providing it with a plurality of holes, as taught by Russo et al., since doing so would allow for body fluid to be drained from a body cavity along a substantial length

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of the tube and/or from a substantial portion of the body cavity. Thus, it would have been obvious to one of ordinary skill in the art to provide the surgical drain of Johnson with a plurality of holes, as taught by Russo et al., since doing so would allow for body fluid to be drained from a body cavity along a substantial length of the tube and/or from a substantial portion of the body cavity.

In regard to Claims 8 and 15, Johnson discloses that the transmitting element and sensing system 11, 21, 27 are embedded in the conduit (column 3, lines 6-9). Johnson discloses that claimed invention except for the element and system being embedded within the conduit behind a material that is optically transparent. Yarger discloses a surgical drain for removing fluid from a body cavity. Yarger teaches that the elongate tubular section 22 (analogous to an elongated conduit) may be made of a transparent or translucent material so that a caregiver can view the flow of the fluid through the lumens or the interior of the tube 22 (column 8, lines 24-27). One would have been motivated to modify the elongated conduit of Johnson to be made of a transparent material as taught by Yarger, since doing so would allow a caregiver can view the flow of the fluid through the lumens or the interior of the conduit. Thus, it would have been obvious to one of ordinary skill in the art to modify the elongated conduit of Johnson to be made of a transparent material as taught by Yarger, since doing so would allow a caregiver can view the flow of the fluid through the lumens or the interior of the conduit.

15. Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Johnson in view of Takezawa et al.

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In regard to Claim 12, Johnson discloses the claimed invention but does not disclose that the drain further comprises a third sensing system. Takezawa et al. disclose a surgical drain comprising an elongated conduit and a sensing system, which includes a temperature sensor. Takezawa et al. teach that providing a drain with temperature sensor allows for control, observation, and monitoring of the temperature of the internal tissue during or after operation and/or during treatment. One would have been motivated to modify the drain of Johnson to provide a temperature sensor (i.e., a third sensing system different from the first and second sensing systems) since doing so would allow for control, observation, and monitoring of the temperature of the internal tissue during or after operation and/or during treatment. Thus, it would have been obvious to one of ordinary skill in the art to modify the drain of Johnson to provide a temperature sensor (i.e., a third sensing system different from the first and second sensing systems) since doing so would allow for control, observation, and monitoring of the temperature of the internal tissue during or after operation and/or during treatment.

### ***Double Patenting***

16. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double

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patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

17. Claims 1 and 3-6 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 5-8, 16, 22-25, 34-38, 44-48, 54-58, 66-70, 79-83, 88-90 and 92 of copending Application No. 10/776,021. Although the conflicting claims are not identical, they are not patentably distinct from each other because Claims 1 and 3-6 of the current application are merely broader than and therefore "anticipate" or renders obvious Claims 1, 5-8, 16, 22-25, 34-38, 44-48, 54-58, 66-70, 79-83, 88-90 and 92 of the copending application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

In regard to Claim 1, Claims 1, 16, 34, 44, 54, 66, 79, and 88 of copending '021 disclose a surgical drain comprising at least an elongated conduit and a first sensing system.

In regard to Claim 3, Claims 6, 23, 37, 47, 57, 69, and 82 of copending '021 mirror or substantially correspond to Claim 3 of the current application.

In regard to Claim 4, Claims 5, 22, 35, 45, 55, 67, 80, and 89 of copending '021 mirror substantially correspond to Claim 4 of the current application.

In regard to Claim 5, Claims 7, 24, 38, 48, 58, 70, 83, and 90 of copending '021 mirror substantially correspond to Claim 5 of the current application.

In regard to Claim 6, Claims 8, 25, 36, 46, 56, 68, 81 and 92 of copending '021 mirror substantially correspond to Claim 6 of the current application.

18. Claims 1, 3-8, 10-11, and 13-19 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 5-6, 8-9, 11-15, 17-20, 27-31, 33-37, 44-45, 48, and 56 of copending Application No. 10/775,666. Although the conflicting claims are not identical, they are not patentably distinct from each other because Claims 1 3-8, 10-11, and 13-19 of the current application are merely broader than and therefore “anticipate” or renders obvious Claims 1, 5-6, 8-9, 11-15, 17-20, 27-31, 33-37, 44-45, 48, and 56 of the copending application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

In regard to Claim 1, Claims 1, 14, 27, 28, 44, and 56 of copending '666 disclose a surgical drain comprising at least an elongated conduit and a first sensing system.

In regard to Claim 3, Claims 9, 12, 14, 27, 29, and 45 of copending '666 mirror or substantially correspond to Claim 3 of the current application.

In regard to Claim 4, Claims 5-6, 30, and 48 of copending '666 mirror or substantially correspond to Claim 4 of the current application.

In regard to Claim 5, Claim 31 of copending '666 mirror or substantially correspond to Claim 3 of the current application.

In regard to Claim 6, Claims 11, 33-35, and 44-45 of copending '666 mirror or substantially correspond to Claim 6 of the current application.



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In regard to Claim 7, Claims 8 and 28 of copending '666 disclose a surgical drain comprising at least an elongated conduit, a first sensing system, and a first transmitting element.

In regard to Claim 10, Claims 36-37 of copending '666 mirror or substantially correspond to Claim 10 of the current application.

In regard to Claim 11, Claim 13-14 of copending '666 mirror or substantially correspond to Claim 11 of the current application.

In regard to Claim 13, see discussion for Claim 4.

In regard to Claim 14, see discussion for Claim 5.

In regard to Claim 15, see discussion for Claim 6.

In regard to Claim 16, Claim 15 of copending '666 mirror or substantially correspond to Claim 16 of the current application.

In regard to Claim 17, Claims 17-18 and 33 of copending '666 mirror or substantially correspond to Claim 17 of the current application.

In regard to Claim 18, Claim 19 of copending '666 mirror or substantially correspond to Claim 18 of the current application.

In regard to Claim 19, Claim 20 of copending '666 mirror or substantially correspond to Claim 19 of the current application.

19. Claims 1, 3-7, 16, 18, 21-23 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5, 9, 17-20 of copending Application No. 10/775,670. Although the conflicting claims are not

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identical, they are not patentably distinct from each other because Claims 1, 3-7, 16, 18, and 21-23 of the current application are merely broader than and therefore “anticipate” or renders obvious Claims 1-5, 9, 17-20 of the copending application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

In regard to Claim 1, Claim 1 of copending ‘670 discloses a surgical drain comprising at least an elongated conduit and a first sensing system.

In regard to Claim 3, the “third sensing system” of Claim 4 of the copending application ‘670 is considered analogous to a “second sensing system” of Claim 3 of the current application.

In regard to Claim 4, Claim 2 of copending ‘670 mirror or substantially correspond to Claim 4 of the current application.

In regard to Claim 5, Claim 5 of copending ‘670 mirror or substantially correspond to Claim 5 of the current application.

In regard to Claim 6, Claim 9 of copending ‘670 mirror or substantially correspond to Claim 6 of the current application.

In regard to Claim 7, Claim 3 of copending ‘670 mirror or substantially correspond to Claim 7 of the current application.

In regard to Claims 16 and 21, Claim 17 of copending ‘670 mirror or substantially correspond to the method of Claims 16 and 21 of the current application.

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In regard to Claim 18, Claims 18-20 of copending '670 mirror or substantially correspond to Claim 18 of the current application.

In regard to Claim 22, Claims 18-20 of copending '670 mirror or substantially correspond to Claim 22 of the current application.

In regard to Claim 23, Claim 19 of copending '670 mirror or substantially correspond to Claim 23 of the current application.

20. Claims 1, 3-7, 16, 18, and 21-23 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-3, 5, 9, and 17-20 of copending Application No. 10/776,022. Although the conflicting claims are not identical, they are not patentably distinct from each other because Claims 1, 3-7, 16, 18, 21-23 of the current application are merely broader than and therefore "anticipate" or renders obvious Claims 1-3, 5, 9, and 17-20 of the copending application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

In regard to Claims 1 and 3, Claim 1 of copending '022 discloses a surgical drain comprising at least an elongated conduit and a first sensing system.

In regard to Claim 4, Claim 2 of copending '022 mirror or substantially correspond to Claim 4 of the current application.

In regard to Claim 5, Claim 5 of copending '022 mirror or substantially correspond to Claim 5 of the current application.

In regard to Claim 6, Claim 9 of copending '022 mirror or substantially correspond to Claim 6 of the current application.

In regard to Claim 7, Claim 3 of copending '022 mirror or substantially correspond to Claim 7 of the current application.

In regard to Claim 16, Claim 17 of copending '022 mirror or substantially correspond to Claim 4 of the current application.

In regard to Claim 18, Claims 18-20 of copending '022 mirror or substantially correspond to Claim 18 of the current application.

In regard to Claim 21, Claim 17 of copending '022 mirror or substantially correspond to Claim 21 of the current application.

In regard to Claim 22, Claims 18-20 of copending '022 mirror or substantially correspond to Claim 22 of the current application.

In regard to Claim 23, Claim 19 of copending '022 mirror or substantially correspond to Claim 23 of the current application.

### ***Conclusion***


21. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Maxwell (US 4951669), Gunther (US 5020537), Essen-Moller (US 5,438,985), and Giuliani (US 4954129).

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keshia Gibson whose telephone number is (571) 272-7136. The examiner can normally be reached on M-F 8:30 a.m. - 6 p.m., out every other Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tatyana Zalukaeva can be reached on (571) 272-1115. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
Keshia Gibson  
Examiner, Art Unit 3761  
klg 8/3/05

TATYANA ZALUKAEVA  
PRIMARY EXAMINER

